

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 76-1372

To be argued by  
ROBERT J. COSTELLO

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1372

UNITED STATES OF AMERICA,

*Appellant,*

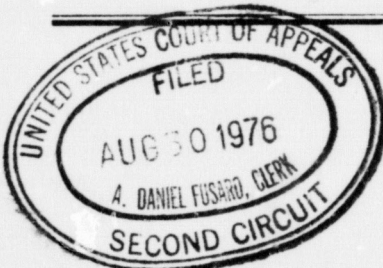
—v.—

REGINALD SATTERFIELD,

*Defendant-Appellee.*

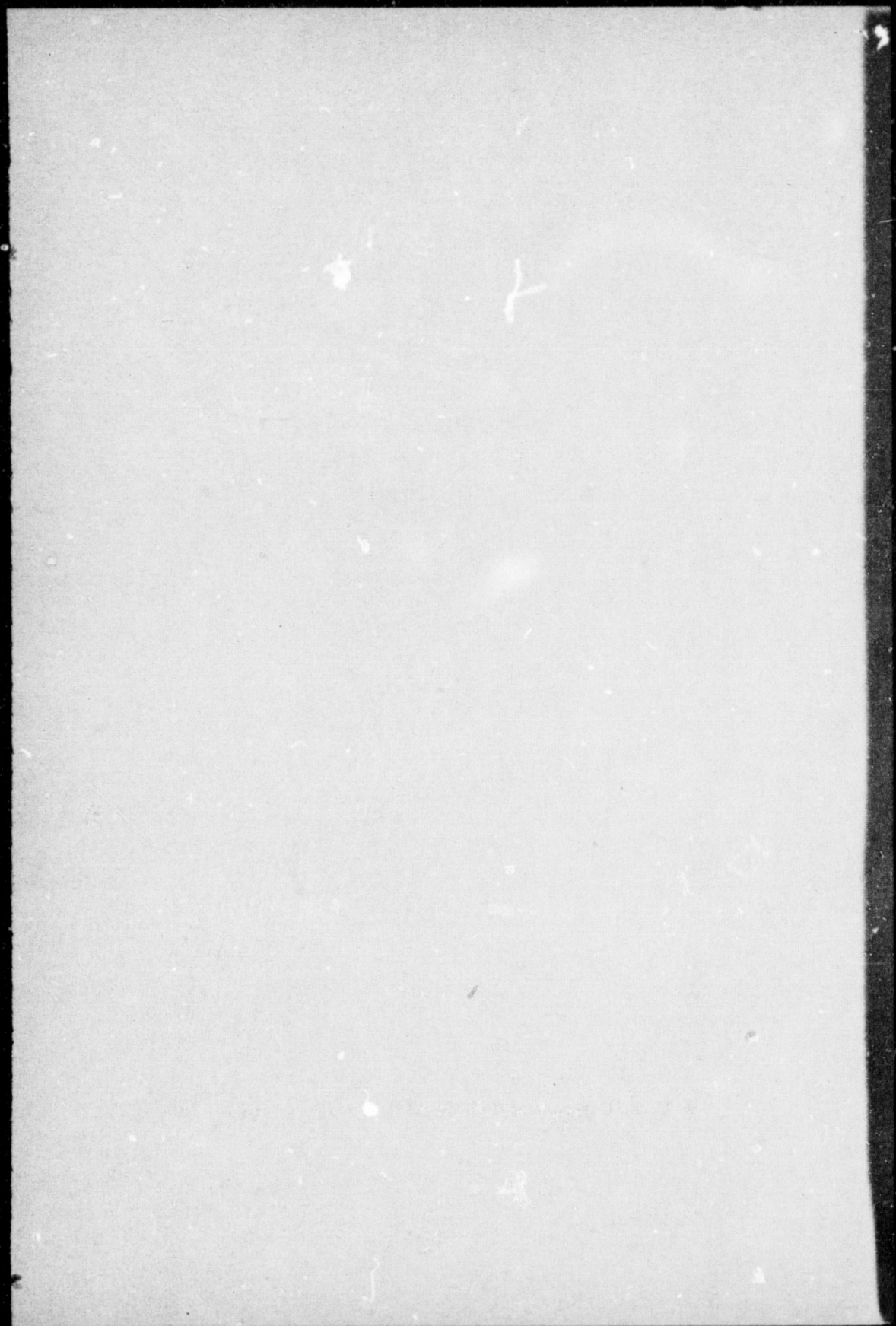
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### BRIEF FOR THE UNITED STATES OF AMERICA



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## TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Statement of Facts .....	2
ARGUMENT:	
The District Court erred in suppressing Satterfield's statements .....	6
CONCLUSION .....	17

## TABLE OF CASES

<i>Arrington v. Maxwell</i> , 409 F.2d 849 (6th Cir.), cert. denied, 382 U.S. 909 (1965) .....	14
<i>Coughlan v. United States</i> , 391 F.2d 371 (9th Cir.), cert. denied, 393 U.S. 870 (1968) .....	13
<i>Davis v. Burke</i> , 408 F.2d 779 (7th Cir. 1969) .....	8
<i>Dillon v. United States</i> , 391 F.2d 433 (10th Cir.), cert. denied, 393 U.S. 889 (1968) .....	13
<i>Faretta v. California</i> , 422 U.S. 806 (1975) .....	14, 15
<i>Hunt v. Nelson</i> , 440 F.2d 58 (9th Cir. 1971) .....	8
<i>Massiah v. United States</i> , 377 U.S. 201 (1964) ..	5, 6, 7, 10, 12, 16
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1965) ...	3, 6, 11, 12, 14, 15, 16
<i>Moore v. Wolff</i> , 495 F.2d 35 (8th Cir. 1974) .....	13
<i>Reinke v. United States</i> , 405 F.2d 228 (9th Cir. 1968)	13
<i>Spano v. New York</i> , 360 U.S. 315 (1959) .....	7

	PAGE
<i>United States v. Accardi</i> , 342 F.2d 679 (2d Cir. 1965) .....	8, 14
<i>United States v. Barone</i> , 467 F.2d 247 (2d Cir. 1972) .....	7, 10, 11
<i>United States v. Cobbs</i> , 481 F.2d 196 (3d Cir.), cert. denied, 414 U.S. 980 (1973) .....	13
<i>United States v. Cohen</i> , 358 F. Supp. 112 (S.D.N.Y.), aff'd on other grounds, 489 F.2d 945 (2d Cir. 1973) .....	7
<i>United States v. Crisp</i> , 435 F.2d 354 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971) .....	13
<i>United States v. DeLoy</i> , 421 F.2d 900 (5th Cir. 1970) .....	8, 14
<i>United States v. Diggs</i> , 497 F.2d 391 (2d Cir.), cert. denied, 491 U.S. 861 (1974) .....	10, 11
<i>United States v. Duvall</i> , Dkt. No. 75-1225 (2d Cir. February 26, 1976) .....	11, 12, 16
<i>United States v. Garcia</i> , 377 F.2d 321 (2d Cir. 1967) .....	8, 13
<i>United States v. Gaynor</i> , 472 F.2d 899 (2d Cir. 1973) .....	13
<i>United States v. Hall</i> , 523 F.2d 665 (2d Cir. 1975) .....	12
<i>United States ex rel. Lopez v. Zelker</i> , 344 F. Supp. 1050 (S.D.N.Y.), aff'd without opinion, 465 F.2d 1405 (2d Cir.), cert. denied, 409 U.S. 1049 (1972) .....	6, 9, 10, 14, 16
<i>United States v. Massimo</i> , 432 F.2d 324 (2d Cir. 1970) .....	6, 9
<i>United States v. Maxwell</i> , 383 F.2d 437 (2d Cir. 1967), cert. denied, 389 U.S. 1057 (1968) ....	13
<i>United States v. Messina</i> , 507 F.2d 73 (d Cir. 1974), cert. denied, 420 U.S. 993 (1975) .....	12

	PAGE
<i>United States ex rel. O'Connor v. New Jersey</i> , 405 F.2d 632 (3d Cir.), <i>cert. denied</i> , 395 U.S. 923 (1969) .....	13
<i>United States v. Reed</i> , 526 F.2d 740 (2d Cir. 1975), <i>cert. denied</i> , 90 S. Ct. 1431 (March 8, 1976) ...	12
<i>United States v. Reynolds</i> , 496 F.2d 158 (6th Cir. 1974) .....	13
<i>United States v. Springer</i> , 460 F.2d 1344 (7th Cir.), <i>cert. denied</i> , 409 U.S. 873 (1972) .....	13
<i>United States v. Thomas</i> , 474 F.2d 110 (10th Cir.), <i>cert. denied</i> , 412 U.S. 932 (1973) .....	13
<i>United States v. Vasquez</i> , 476 F.2d 730 (5th Cir.), <i>cert. denied</i> , 414 U.S. 836 (1973) .....	13
<i>United States ex rel. Wooden v. Vincent</i> , 391 F. Supp. 1260 (S.D.N.Y.3, <i>aff'd without opinion</i> , 508 F.2d 837 (2d Cir. 1974) .....	13



**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 76-1372**

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UNITED STATES OF AMERICA,

*Appellant,*

—v.—

REGINALD SATTERFIELD,

*Defendant-Appellee.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

The United States appeals, pursuant to Title 18, United States Code, Section 3731, from two pre-trial orders filed on July 9, 1976, and July 23, 1976, by the Honorable Whitman Knapp, United States District Judge for the Southern District of New York, suppressing three statements of Reginald Satterfield as evidence at trial.

Indictment 76 Cr. 376\*, filed on April 14, 1976, charged Reginald Satterfield, Ronald Weston and James Byrd with one count of conspiring to violate the federal narcotics laws, in violation of Title 21, United States Code, Section 846 and with three counts of possession with intent to distribute of more than 10 ounces of heroin, in violation of Title 21, United States Code, Sections 841 (a) (1) and 841 (b) (1) (A).

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\* This indictment superseded 76 Cr. 107, which named only Ronald Weston.

Prior to trial, Satterfield moved to suppress as evidence against him three statements made after his arrest. Following a hearing held on June 30, 1976, the District Court, in a written memorandum opinion, granted Satterfield's motion. (App. 158).<sup>\*</sup> In response to a motion for rehearing filed by the Government, the District Court filed a second written memorandum (App. 186), again concluding that the three statements must be suppressed, but on different legal grounds.

The trial, originally scheduled for July 6, 1976, has now been adjourned to November 15, 1976, pending the outcome of this appeal.

### Statement of Facts\*\*

On April 14, 1976, this indictment was filed in the United States District Court for the Southern District of New York, and on the same day warrants were issued for the arrest of defendants Satterfield and Byrd.

On April 16, 1976, at approximately 10:00 A.M., Reginald Satterfield was arrested by Drug Enforcement

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<sup>\*</sup> "App." refers to the Government's Appendix. "GX" refers to Government exhibits presented at the suppression hearing.

<sup>\*\*</sup> At the hearing on the motion to suppress, three Drug Enforcement Administration agents—John Coleman, James Kibble, and Andrew Fenrich—testified for the Government. In addition, Satterfield testified in his own behalf. Satterfield's testimony differed from that of the agents in that he "did not recall" (App. 86) being warned of his *Miranda* rights immediately after his arrest, and he emphasized his inability to understand what was said to him because of his emotional state. While Judge Knapp did not specifically discuss the credibility of the witnesses before him, his findings of facts substantially adopted those advanced by the Government witnesses and he did observe that he accepted "the testimony of the agents substantially as to what happened." (App. 106). This statement of facts is based primarily on those found by Judge Knapp, and also upon agreements as to certain facts reached prior to the hearing (App. 26-30).

Administration agents in front of the Fifth Avenue Armory. (App. 27, 140). The District Court found that following his arrest, Satterfield was placed in a car, advised of his *Miranda* rights and taken to Drug Enforcement Administration headquarters. (App. 159). During much of the time that Satterfield was in the car or at the Drug Enforcement Administration office that day, he was crying and whimpering. (App. 159). The District Court found, however, that Satterfield was warned of and fully understood his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). It further found that Satterfield, a 35-year old college graduate who had never been arrested before, was informed and understood that he was under indictment for conspiracy to violate the federal narcotics laws. Satterfield then indicated he wished to cooperate and gave the agents a statement substantially admitting his involvement in the conspiracy. Immediately after that statement was made, Satterfield was taken to the United States Attorney's Office where he was again advised of his rights and the details of the indictment by an Assistant United States Attorney. Satterfield then signed a written statement substantially similar to the first statement that explicitly noted that the statement was "freely given." (App. 158; GX 2). Shortly thereafter, Satterfield was arraigned before a United States Magistrate, who found him unqualified under the Criminal Justice Act for assigned counsel and released him on a personal recognizance bond to be co-signed by his brother by the following Monday. (App. 136; GX 1). As Satterfield was leaving the Court-house, one of the agents suggested that if he wished to continue cooperating he should come to Drug Enforcement Administration headquarters on Monday and provide further information. (App. 62).

On Monday, April 19, 1976, Satterfield voluntarily \* returned to Drug Enforcement Administration headquarters and, following additional *Miranda* warnings, made a third statement, substantially the same as the first two. The warnings and the statement were tape recorded and subsequently transcribed. (App. 144).

On June 28, 1976, Satterfield filed a motion to suppress the three statements and on June 30, 1976, the trial court conducted a hearing to resolve the factual matters in dispute. At the end of the hearing, Judge Knapp initially indicated that he would deny Satterfield's motion on the ground of untimeliness, but that if he decided the motion on the merits he would suppress all three statements. (App. 110-111).

Following a conference in chambers on July 1, 1976, Judge Knapp stated that he had changed his mind and would decide the motion on the merits. (App. 149). Thereafter, on July 9, 1976, Judge Knapp filed the first memorandum and order suppressing all three statements. In this memorandum, Judge Knapp cited as grounds for the suppression of the two statements made on April 16, 1976, the fact that Satterfield was crying following his arrest and was in such an emotional state that he was unable to intelligently waive his rights. Judge Knapp also suppressed the confession made by Satterfield on Monday, April 19, 1976, at Drug Enforcement Administration headquarters, following his release on the previous Friday on a personal recognizance bond, on the ground that, as a matter of law, *Miranda* warnings together with acknowledgment by the defendant that he is under indictment were insufficient to allow a defendant validly to waive his right to counsel under the Sixth

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\* While Satterfield testified that he returned to DEA headquarters on the Monday following his arrest because he felt that it "was part of the procedure" (App. 84), Judge Knapp specifically found that "Satterfield was subject to no compulsion whatever to return to DEA headquarters on Monday." (App. 161).

Amendment.\* The District Court ruled that in addition to Miranda rights the Government was required to give the defendant the same advice a judge would have to give before allowing a defendant to proceed to trial without an attorney. (App. 163).

On July 16, 1976 the Government filed a motion to reargue the District Court's opinion filed July 9, 1976. By a memorandum and order filed July 23, 1976 the District Court modified its earlier order. Judge Knapp explicitly withdrew that portion of his earlier memorandum concluding that Satterfield had been unable to comprehend the advice of rights or the fact that he was under indictment and found that he had in fact understood those facts. Rather, he ordered all three statements suppressed solely on the legal ground that the interviews were conducted after the filing of the indictment and thus were taken in violation of the Sixth Amendment and *Massiah v. United States*, 377 U.S. 201 (1964).

The trial, which had been originally scheduled for July 6, 1976, has been adjourned to November 15, 1976, at the request of all parties, so that the Government could take this appeal.

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\* At the end of the suppression hearing Judge Knapp explained his position:

"In other words, it should be necessary to do more than merely give him his Miranda rights. It should be explained to him how foolish it is to proceed without an attorney once an indictment has been returned." (App. 109).

## ARGUMENT

### The District Court erred in suppressing Satterfield's statements.

By the memorandum orders filed on July 9 and 23, 1976, taken together, the District Court suppressed Satterfield's statements solely on the ground that the agents did not comport with standards considerably more stringent than those delineated in *Miranda v. Arizona*, *supra*. In particular, the District Court held that, while Satterfield's waiver would have been sufficient had he not been under indictment, "after indictment the advice of counsel can be waived only upon such warnings and explanations as would justify a court in permitting a defendant to proceed *pro se* at trial." (App. 163); footnote omitted) The Government submits that the District Court's ruling was totally incorrect. In particular, the decision is not supported by the precedents and reasoning upon which it relies. Rather, the decision is utterly inconsistent with precedents in this and other circuits and constructs a new and unworkable procedure that will needlessly create grave difficulties in the administration of justice. Thus, the ruling should be reversed.

Judge Knapp's opinion principally relied on the decision of the Supreme Court in *Massiah v. United States*, *supra*, and on two opinions by judges in this Circuit interpreting *Massiah*, *United States ex rel. Lopez v. Zelker*, 344 F. Supp. 1050 (S.D.N.Y.) (Frankel, J.), *aff'd without opinion*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 40 U.S. 1049 (1972) and *United States v. Massimo*, 432 F.2d 324, 326 (2d Cir. 1970) (Friendly, J., dissenting). None of the holdings in these cases support Judge Knapp's decision, and, to the extent that language in the opinions may appear to do so, that language has been rejected by this Court.

The starting point of Judge Knapp's analysis was the Supreme Court's opinion in *Massiah v. United States*, *supra*. That decision simply did not involve facts analogous to those in this case. The situation facing the Supreme Court in *Massiah* was concisely summarized in the opening words of the majority opinion:

"The petitioner was indicted for violating the federal narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against the petitioner at his trial over his objection."

377 U.S. at 201. In holding that such surreptitious monitoring of an indicted defendant's conversations violated the defendant's Sixth Amendment right to counsel, the Court quite clearly was concerned with statements made without any knowing waiver. The Court did not consider, nor did it hold, that any statement made by an indicted defendant will be excluded absent the showing of an extraordinary waiver; indeed, since *Massiah* was unaware of the monitoring, he could make no waiver at all.\* This Court, and other circuits, have on several occasions noted the surreptitious nature of the *Massiah* interceptions, and limited the holding of *Massiah* to those facts. As Judge Bauman wrote in *United States v. Cohen*, 358 F. Supp. 112 (S.D.N.Y.), *aff'd on other grounds*, 489 F.2d 945 (2d Cir. 1973):

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\* In *Spano v. New York*, 360 U.S. 315 (1959), upon which the *Massiah* Court heavily relied, the Supreme Court specifically noted that it was unnecessary to reach the contention that "following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment." *Id.* at 320.

"Seigel's reliance on *Massiah* is misplaced. In that case, the Court held that statements deliberately elicited by surreptitious means from a defendant already under indictment could not be admitted against him at the trial of that indictment. None of the devious methods practiced in *Massiah* were visited upon Seigel in the instant case. Unlike *Massiah*, Seigel was fully aware that he was making incriminating statements to government agents, and fully aware of what he stood to gain by doing so. The record here is barren of any coercion or deception practiced on him. Our Court of Appeals has emphasized (as have others) that *Massiah* is inapplicable in the absence of deliberate deception practiced by government agents. *United States v. Barone*, 467 F.2d 247 (2d Cir. 1972); *United States v. Garcia*, 377 F.2d 321 (2d Cir. 1967); *United States v. Accardi*, 342 F.2d 679 (2d Cir. 1965); *Hunt v. Nelson*, 440 F.2d 58 (9th Cir. 1971); *United States v. DeLoy*, 421 F.2d 900 (5th Cir. 1970); *Davis v. Burke*, 408 F.2d 779 (7th Cir. 1969)." *Id.* at 126.

Thus, in applying *Massiah* to an indicted defendant who had not retained a lawyer (although he had had ample opportunity to do so by the time of the third statement on April 19, 1976),\* who was fully aware that he was incriminating himself, and who was explicitly and repeatedly advised of his constitutional rights, Judge Knapp created a considerable, and unwarranted, development in the law.\*\*

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\* Satterfield did not retain his attorney until June 3, 1976, although he was determined to be financially capable of doing so at the time of his arraignment on April 16, 1976.

\*\* In fairness to Judge Knapp, he expressed on several occasions his awareness of the newness of the path he was blazing.

"If I was so sure I was right, I would feel differently. I am not so sure." (App. 115).

[Footnote continued on following page]

Nor does Judge Friendly's dissenting opinion in *United States v. Massimo*, *supra*, provide proper support for Judge Knapp's conclusion. In that opinion, Judge Friendly stated in dictum:

"Warnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion *would not necessarily* meet what I regard as the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached." (emphasis added)

Not only is this language speculative dictum at best (indeed, Judge Friendly did not specify what "higher standard" would have to be met) but that point of view was not—and has not been—adopted by this Court.

Similarly, the decision of Judge Frankel in *United States ex rel. Lopez v. Zelker*, *supra*, is factually distinguishable from this case. In *Lopez*, the defendant was indicted in state court for first degree murder. Subsequently, he was arrested by the F.B.I. on a federal warrant based on the state indictment and, after being given his *Miranda* warnings, confessed to the murder. On Lopez' habeas corpus proceeding following his state court conviction, the District Court found not only that Lopez was unaware of the indictment but also that he erroneously believed he would only be charged with manslaughter. Judge Frankel further noted that the arresting agents were aware of the details of Lopez' legal

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"I am not confident I am right." (App. 118).

"I am not altogether confident that the Court of Appeals would adopt such rule if it was put to them." (App. 128).

Indeed, on one occasion Judge Knapp referred to "my new rule." (App. 120).

situation and did not inform Lopez of the indictment, a matter "of obvious moment". Therefore, he refused to rule that the defendant had knowingly waived his right to counsel and held inadmissible his post-indictment statements given in the absence of counsel. Judge Frankel went on to state that whether an indicted defendant could waive the right to counsel under *Massiah* was a debatable question and opined that in order to do so the defendant not only must be advised of the *Miranda* warnings but also warned "against the likely folly of a layman's proceeding without the aid of a lawyer." *Id.* at 1054. This Court, however, has not followed *Lopez*, and indeed has specifically disapproved or limited it to its facts. In *United States v. Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 491 U.S. 861 (1974), the Court specified that the summary affirmance of *Lopez* was without precedential value, and further noted that it had no bearing where a defendant was specifically aware "of the crime of which he was suspected." *Id.* at 393 n.3.

We submit that *Diggs* and other decisions of this Court are squarely opposed to Judge Knapp's ruling in this case. In *Diggs*, police officers elicited an incriminating statement from a defendant who had not been indicted, but who had been arrested, was in custody, and was represented by counsel. Acknowledging that the right of counsel had attached and that the interrogation was not in the presence or with the permission of counsel, this Court nonetheless ruled that since adequate *Miranda* warnings had been given, *id.* at n.1, and since the defendant appeared to understand that he was the suspect of a serious offense and exhibited other indicia of voluntariness, the statement was admissible.

Indeed, the citation by the *Diggs* Court of the earlier decision in *United States v. Barone*, 467 F.2d 247 (2d Cir. 1972), as the sole precedent upon which it relied, dramatically underlines the applicability of *Diggs* to this

case. In *Barone*, an indicted defendant was approached by agents and, after being warned of his rights and using the opportunity to call his attorney, made incriminating statements. This Court noted:

"In *Massiah v. United States* the Supreme Court held that inculpatory statements deceptively elicited from an indicted defendant in the absence of counsel were inadmissible. The circumstances of the present case are quite different from the circumstances of *Massiah*. Here there was not only no deception but an express waiver of counsel signed by Barone, see *Miranda v. Arizona*, 384 U.S. 436, 475-476, 483-486 (1966), and a telephone conversation between Barone and his attorney. We hold that *Massiah* is inapplicable."

*Id.* at 249. Judge Knapp distinguished *Barone* on the ground that in that case the defendant had conferred with his counsel prior to waiving his *Miranda* rights. (App. 163). While this observation is factually accurate, we submit that it does not provide a meaningful basis for distinguishing *Barone*, particularly since, as this Court specifically noted, there was absolutely no evidence concerning the content of Barone's conversation with his attorney. *Id.* Of considerably greater significance were the facts that Barone was under indictment and that this Court considered the *Miranda* warnings, in themselves, to be sufficiently effective and valid warnings. Taken together with *Diggs*, in which the defendant did *not* consult with his attorney, the law is clear that a properly advised defendant may waive his rights to counsel after the right to counsel has attached, whether because of indictment, see *United States v. Duvall*, Dkt. No. 75-1225, slip op. 2123 (2d Cir. Feb. 26, 1976), or because of the actual appointment or retention of a lawyer.

Indeed, this Court has on several occasions since *Diggs* relied on that decision for this proposition. *United States v. Reed*, 526 F.2d 740, 742 (2d Cir. 1975), *cert. denied*, 90 S. Ct. 1431 (March 8, 1976)\*; *United States v. Hall*, 523 F.2d 665, 668 n.4 (2d Cir. 1975).\*\* See

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\* *Reed* concerned a defendant who was interviewed after indictment without being advised of more than his *Miranda* rights, and thus directly controls this case. While the opinion does not mention the fact that the interview was post-indictment, this clearly appears in the record. Further, we submit, the *Reed* Court's reliance on *Diggs*, rather than on the myriad decisions dealing with the adequacy of *Miranda* warnings *simpliciter*, indicates that it was aware of that fact.

\*\*Two further decisions of this Court, neither of which was discussed by Judge Knapp, might appear to bear on this issue.

In *United States v. Duvall*, *supra*, this Court held that the right to counsel did not attach during the period "after complaint [has been filed] but before arraignment." *Id.* at 2134. The Court characterized Duvall's claim as that "any interrogation without the presence of counsel violated his Sixth Amendment rights under *Massiah v. United States*, 377 U.S. 201 (1964), unless these were waived, and that conduct sufficient to constitute a waiver under *Miranda* does not suffice to waive *Massiah* rights unless the accused has been advised that he is the subject of a criminal prosecution. . . ." *Id.* at 2130-2131 (emphasis added). Initially, it should be noted that the *Duvall* Court accepted Duvall's argument at best only for the purposes of deciding his claim on another ground—that is, that the right to counsel had not even been attached. Indeed, the Court specifically noted that Duvall's assertion was inconsistent with decisions in this Court. *Id.* Furthermore, Duvall's claim, as phrased by the Court, was only that *Massiah* rights could not be waived "unless the accused has been advised that he is the subject of a criminal prosecution. . . ." That condition was clearly met here, and thus the *Duvall* decision to that extent supports the Government's position.

In *United States v. Messina*, 507 F.2d 73 (2d Cir. 1974), *cert. denied*, 420 U.S. 993 (1975), this Court faced a claim that a consent to a search by a defendant made after his arrest was violative of Sixth Amendment rights under *Massiah*. The Court's resolution of that claim—that "Messina had given his consent before the criminal prosecution had begun and Sixth Amendment rights had attached . . .," 507 F.2d at 77—was concerned only with the *timing* of the attachment of Sixth Amendment rights, and not with the scope of those rights or the manner in which they may be waived.

also *United States ex rel. Wooden v. Vincert*, 391 F. Supp. 1260, 1263 (S.D.N.Y.) (Duffy, J.), *aff'd without opinion*, 508 F.2d 837 (2d Cir. 1974). Furthermore, as Judge Knapp noted (App. 163), other circuits have ruled that the right to counsel may be waived, even after that right has attached, merely upon the advice of *Miranda* warnings. *United States v. Cobbs*, 481 F.2d 196 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973); *United States v. Crisp*, 435 F.2d 354 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *United States v. Vasquez*, 476 F.2d 730 (5th Cir.), *cert. denied*, 414 U.S. 836 (1973) (pre-indictment, state counsel appointed on related charge); *United States v. Reynolds*, 496 F.2d 158, 162 (6th Cir. 1974) (pre-indictment; post appointment of counsel); *United States v. Springer*, 460 F.2d 1344, 1353 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972) (pre-indictment; post appointment of counsel); *Moore v. Wolff*, 495 F.2d 35, 37 (8th Cir. 1974) (pre-indictment; post appointment of counsel); *Reinke v. United States*, 405 F.2d 228 (9th Cir. 1968) (pre-indictment; post appointment of counsel); *Coughlan v. United States*, 391 F.2d 371, 372 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968) (pre-indictment; post appointment of counsel); *Dillon v. United States*, 391 F.2d 433 (10th Cir.), *cert. denied*, 393 U.S. 889 (1968) (pre-indictment, post retention of counsel); *but see United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *United States ex rel. O'Connor v. New Jersey*, 405 F.2d 632 (3d Cir.), *cert. denied*, 395 U.S. 923 (1969).\*

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\* It is also clear that there is no violation of *Massiah* where the defendant volunteers the incriminating information without any solicitation. *United States v. Gaynor*, 472 F.2d 899 (2d Cir. 1973); *United States v. Maxwell*, 383 F.2d 437, 443 (2d Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968); *United States v. Garcia*, 377 F.2d 321, 324 (2d Cir.), *cert. denied*, 389 U.S. 991

[Footnote continued on following page]

Thus, Judge Knapp's ruling is contrary not only to express rulings in this Court but to the vast weight of authority in other jurisdictions as well.

Finally, we submit that Judge Knapp's ruling presents a new and unworkable procedural requirement. While in a footnote he observed that "it is difficult to conceive situations where post-indictment counsel could intelligently be waived," (App. 166), in the text he noted that the right to counsel could be waived "upon such warnings and explanations as would justify a court in permitting a defendant to proceed *pro se* at trial." (App. 163). This standard is notably imprecise, and the subsequent reference to *Faretta v. California*, 422 U.S. 806, 835 (1975), provides no firmer benchmark.\* More significantly, requiring agents to advise a defendant of the "folly," *United States ex rel. Lopez v. Zelker*, *supra*, 344 F. Supp. at 1054, or the "foolishness," (App. 109), of proceeding without counsel would radically restructure or even undermine the very relationship between agent and arrestee that *Miranda* was designed to foster. The *Miranda* warnings serve the function of insuring that a defendant in custody understands that the officers are

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(1967); *United States v. Accardi*, 342 F.2d 697 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); *United States v. De Loy*, *supra*; *Arrington v. Maxwell*, 409 F.2d 849 (6th Cir.), *cert. denied*, 396 U.S. 944 (1969). While the Government does not claim that either of the two statements made on April 16, 1976, falls within this category, the third statement of Satterfield was made voluntarily at a time when Satterfield was not in custody and, as the District Court found Satterfield was under no compulsion to return to Drug Enforcement Administration headquarters. (App. 161). An examination of that statement reveals that on that occasion Satterfield was simply told to "identify yourself and then go ahead" (App. 145). Thereafter, questions were only asked to clarify statements made by Satterfield.

\* In *Faretta*, the Supreme Court stated that a defendant proceeding *pro se* "should be made aware of the dangers and disadvantages of self-representation." 422 U.S. at 835.

his antagonists, and that he proceeds at his own peril. In *Miranda*, the Supreme Court noted that warnings are needed "to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." 384 U.S. at 469. Judge Knapp's ruling would require, in contrast, that the arresting agent assume a quasi-judicial role and actually give advice to help the suspect make a difficult decision. This alteration in the respective roles of officer and accused is, we submit, fraught with dangers that will inevitably produce difficult determinations and confusing records, and will undermine the procedural rights promulgated by *Miranda*.\*

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\*The record in this case presents an illustration of such dangers.

Croup Supervisor Coleman testified that when Satterfield was asked if he wanted an attorney he replied "I don't need one right now." (App. 56). Coleman also testified that Satterfield "asked me if I thought an attorney was necessary since he agreed to cooperate . . ." (App. 33). Coleman clarified this for Judge Knapp by noting: "At this point . . . Your Honor, in my estimation it was a rhetorical question. I didn't believe he was asking me specifically for my advice. He asked me what do I need an attorney for since I am cooperating with you people?" (App. 35). While Coleman's response was well-intentioned and proper, it illustrates the ambiguity of the relationship between officer and suspect that would arise if officers were required to offer further legal advice to those they question and the difficulties that would be presented if courts were called upon to gauge the quality of the advice given and its subjective impact on the suspect.

Judge Knapp's reliance on *Faretta v. California*, *supra* (see App. 166), further illustrates the dangers inherent in his procedural suggestion. When a *pro se* defendant is warned of "the dangers and disadvantages of self-representation," such advice is offered by a judge—a neutral non-party—on the record. In contrast, the warnings required by Judge Knapp would be given by an admitted adversary, and the content, as well as subjective effect, of the warnings would inevitably become the source of frequent and inconclusive pre-trial hearings. By far

[Footnote continued on following page]

Furthermore, even if this Court were to agree with Judge Friendly that a "higher standard" must be met with respect to waivers after the right of counsel has attached—although, to repeat, we contend that the decisions of this Court do not require such a higher standard—the facts of this case meet such a standard. We submit that the only "higher standard" that might reasonably be imposed is that to which the *Duvall* panel adverted, namely, that the suspect be "advised that he is the subject of a criminal prosecution . . .," slip op. 2131. That is precisely what occurred here. Satterfield was not only repeatedly warned of his rights but was on several occasions specifically advised that he was under indictment for narcotics offenses.\* Thus, the circumstances in *Lopez, supra*, where a defendant did not understand his legal situation, simply did not exist in this case. In addition, the absolute voluntariness of Satterfield's actions is apparent, since he not only made the statements several times after repeated warnings, but without being forced to do so came to DEA headquarters to advance his cooperation.\*\*

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the better procedure is to insure that a decision whether or not to cooperate is voluntary and made with complete awareness of the relevant facts rather than requiring the officer to actually give advice as to whether to cooperate.

\* Indeed, he was given a copy of the indictment prior to the second interview. (App. 28). Also, Group Supervisor Coleman testified that he explained conspiracy in layman's terms to Satterfield shortly after the arrest. (App. 32-33, 34).

\*\* In his opinion, Judge Knapp also noted that his ruling comported "with the realities of life. Prior to indictment—before the prosecution has taken shape—there may be many reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entanglement. No such opportunity is open to him after a grand jury has spoken." (App. 163-164). The apparent import of this observation is that since co-operation after indictment is generally fruitless, it

[Footnote continued on following page]

In sum, Satterfield's statements were made voluntarily and he was at all times treated with scrupulous adherence to his constitutional rights.\* Judge Knapp's ruling that the statements should be suppressed was error.

### CONCLUSION

**The ruling of the District Court should be reversed.**

Respectfully submitted,

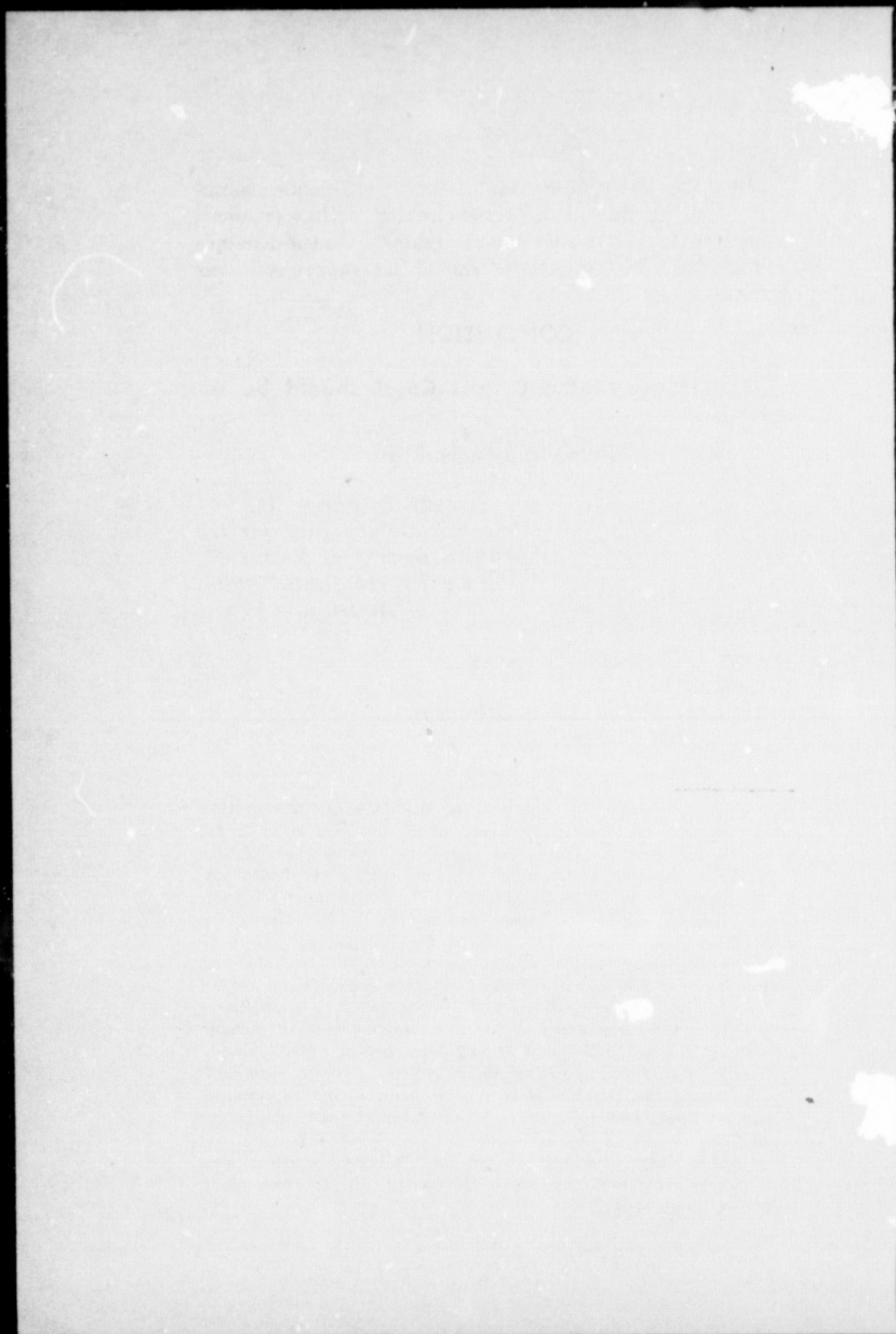
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should be discouraged. Since none of the decisions interpreting either *Miranda* or *Massiah* is based upon the wisdom of a defendant's decision, as opposed to procedures insuring his ability to make a decision voluntarily, this observation is irrelevant. Furthermore, it is factually wrong. There are numerous decisions largely left to the prosecutor that might be affected by cooperation after indictment, such as the number of counts to which a defendant might plead, the position to be taken at sentencing, and possible involvement in other prosecutions. Also, at least in the Southern District of New York, it is exceedingly rare that a defendant arrested for a narcotics violation is "able altogether to avoid indictment or any legal entanglement" simply because he makes incriminating statements or offers to cooperate. The near-universal practice is to require co-operating accomplices to subject themselves to criminal liability for at least one felony count.

\* Judge Knapp specifically noted that "all government agents and officers involved conducted themselves in an exemplary fashion." (App. 164).







AFFIDAVIT OF MAILING

State of New York )  
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Frederick T. Davis being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 30 day of August, 1976  
he served a copy of the within brief  
by placing the same in a properly postpaid franked  
envelope addressed:

Lawrence K. Feitell, Esq.  
150 East 58th Street  
New York New York 10022

And deponent further says that he sealed the said en-  
velope and placed the same in the mail drop for  
mailing the United States Courthouse, Foley  
Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this

30 day of Aug 1976

Gloria Calabrese  
GLORIA CALABRESE  
Notary Public, State of New York  
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Qualified in Kings County  
Commission Expires March 30, 1977